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ELIZABETH WATERMAN

IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ELIZABETH WATERMAN,

Plaintiff,

v.

TIKTOK, INC.,

Defendant.

Civil Action No. 2:24-cv-04802-AB-AJR

**PLAINTIFF’S MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN OPPOSITION TO MOTION TO  
DISMISS**

Plaintiff Elizabeth Waterman (“Plaintiff”) hereby files this Memorandum of Points and Authorities in Opposition to defendant TikTok Inc.’s (“Defendant”) Motion to Dismiss Plaintiff’s Complaint (the “Motion”) [D.E. 24].

## **INTRODUCTION**

Plaintiff filed this lawsuit asserting one claim for copyright infringement with respect to Defendant's publication/display of two of Plaintiff's photographs (collectively, the "Work"). Plaintiff alleges that Defendant's users published/displayed the Work on its website in 2018 and 2019 without Plaintiff's permission/authorization and Defendant failed to take action or exercise its control to remove the infringements. The Motion seeks dismissal on the basis that Plaintiff does not allege that Defendant engaged in volitional conduct, derived a financial benefit, or adequately allege contributory infringement. Accepting Plaintiff's allegations as true (as the Court must do at the motion to dismiss stage), Defendant's arguments for dismissal fail.

## **BACKGROUND**

1. The Complaint alleges that Plaintiff is an accomplished American Photographer and Director whose work has been featured in various performances and has an extensive editorial and commercial portfolio.<sup>1</sup>

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<sup>1</sup> See Complaint, at ¶¶ 6 – 9.



1 that is plausible on its face.” Ashcroft v. Iqbal, 555 U.S. 662 (2009). A complaint  
2 should not be dismissed simply because the court is doubtful that the plaintiff will  
3 be able to prove all of the necessary factual allegations. Bell Atl. Corp. v.  
4 Twombly, 550 U.S. 544, 555 (2007). Accordingly, a well pleaded complaint will  
5 survive a motion to dismiss “even if it appears that a recovery is very remote and  
6 unlikely.” Id. at 556.  
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9 **II. Plaintiff has Alleged Facts to Support a Vicarious Infringement Theory**

10 The Ninth circuit has explained that one “infringes vicariously by profiting  
11 from direct infringement while declining to exercise a right to stop or limit it.”  
12 Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1173 (9th Cir. 2007). The  
13 plaintiff must establish that the defendant exercises the requisite control over the  
14 direct infringer and that the defendant derives a direct financial benefit from the  
15 direct infringement. Id. A defendant exercises control over a direct infringer when  
16 he has both a legal right to stop or limit the directly infringing conduct, as well as  
17 the practical ability to do so. BackGrid USA, Inc. v. Twitter, Inc., No. CV 22-9462-  
18 DMG (ADSx), 2024 U.S. Dist. LEXIS 103090, \*13 (C.D. Cal. June 7, 2024)  
19 (denying a Motion to Dismiss claims for direct, contributory, and vicarious  
20 infringement). The Ninth Circuit has found that it is sufficient to allege that the  
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1 defendant had the ability to identify and remove the infringing work. See Stross v.  
2 Zillow Inc., No. 2:21-cv-01489-RAJ-BAT, 2022 U.S. Dist. LEXIS 147735, \*21  
3 (W.D. Wash. June 21, 2022) (“[I]t is sufficiently alleged that Zillow had the  
4 technical ability to screen or identify the Works based on the URLs included in the  
5 DMCA Takedown Notice”). Here, the Complaint alleges that Plaintiff sent  
6 multiple DMCA takedown notices to Defendant regarding the displayed  
7 infringements and Defendant failed to remove the Work.<sup>4</sup> See Perfect 10 at 1173  
8 (9th Cir. 2007) (one infringes vicariously by profiting from direct infringement  
9 while declining to exercise a right to stop or limit it). Thus, the Complaint  
10 adequately alleges that Defendant had the control and ability to limit or stop the  
11 alleged infringement.  
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15 The second prong requires the defendant to derive a financial benefit from  
16 the infringement. Id. Direct financial interest exists where the availability of  
17 infringing material acts as a draw for customers. BackGrid at \*15 (C.D. Cal. June  
18 7, 2024). The benefit need not be "substantial" in light of the defendant's overall  
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22 <sup>4</sup> Id. at ¶ 21-22.  
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1 profits. Id. Here, Plaintiff alleged that Defendant meets this criterion due to  
2 increased traffic.<sup>5</sup> Defendant harps on the usage of the word “can” rather than “did”  
3 in the Complaint. Plaintiff’s position is this is simply a parsing of words and asserts  
4 that she has satisfied this prong, as all allegations are taken as true, by sufficiently  
5 pleading that Defendant received a financial benefit through the increased traffic.  
6 Hence, Plaintiff has adequately plead that Defendant is liable for vicarious  
7 infringement and the court should deny the motion to dismiss on this basis.  
8 Nevertheless, should this Court agree with Defendant, Plaintiff is willing to amend  
9 the Complaint with more clarifying language.  
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### 13 **III. Plaintiff has Plausibly Alleged a Contributory Infringement Theory**

14 One who, with knowledge of the infringing activity, induces, causes or  
15 materially contributes to the infringing conduct of another may be liable as a  
16 contributory infringer. See Ellison v. Robertson, 357 F.3d 1072, 1076. In other  
17 words, a party may be held liable for contributory infringement if it "(1) has  
18 knowledge of another's infringement and (2) either (a) materially contributes to or  
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22 <sup>5</sup> Id. at ¶ 32.  
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1 (b) induces that infringement. BackGrid at \*9 (C.D. Cal. June 7, 2024). A  
2 defendant who receives a compliant DMCA notice and fails to comply satisfies the  
3 knowledge prong. Id. In this case, the Complaint has adequately plead that  
4 Defendant had actual knowledge based on the providing of takedown notices by  
5 Plaintiff. See Id. at 11 (C.D. Cal. June 7, 2024) (finding that defendant's failure to  
6 claim the notices were not received nor asserting the notices were non-complaint  
7 satisfied the knowledge requirement). See also Stross v. Twitter, Inc., No. 2:21-cv-  
8 8360-SVW, 2022 U.S. Dist. LEXIS 100750, \*14 (C.D. Cal. Feb. 28, 2022) (finding  
9 the Plaintiff plausibly alleges actual knowledge by alleging takedown notices were  
10 provided to Twitter). It should be noted that Defendant cites Stross for the  
11 proposition that Plaintiff fails to state a claim for direct infringement yet fails to  
12 mention that the court in Stross denied the motion to dismiss on the vicarious and  
13 contributory theories of infringement. Here, like in Stross, the Complaint plausibly  
14 alleges Defendant has actual knowledge of the infringement and satisfies the first  
15 prong.

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17 Actual knowledge automatically establishes a "material contribution" theory  
18 of contributory infringement. Giganews, Inc., 847 F.3d at 671. Alternatively, a  
19 plaintiff properly alleges the material contribution element if he can show that a

1 defendant could have taken simple measures to prevent further damage to  
2 copyrighted works yet continued to provide access to infringing works. Stross v.  
3 Meta Platforms, Inc., No. 2:21-cv-08023-MCS-AS, 2022 U.S. Dist. LEXIS  
4 100689, \*11 (C.D. Cal. Apr. 6, 2022). Here, Plaintiff has adequately alleged that  
5 Defendant has actual knowledge and thus satisfies the second prong. Still, Plaintiff  
6 also alleges that compliant takedown notices were provided to Defendant, and they  
7 failed to act. See Oppenheimer v. Allvoices, Inc., No. C 14-00499 LB, 2014 U.S.  
8 Dist. LEXIS 80320, 2014 WL 2604033, at \*7 (N.D. Cal. June 10,  
9 2014) (concluding a plaintiff alleges simple measures when the plaintiff alleges the  
10 ability to remove infringing works and provides takedown notices). Expressly,  
11 Plaintiff has purported that Defendant had actual knowledge of the infringements  
12 via the DMCA takedown notices provided, yet Defendant failed to act.  
13 Consequently, the complaint plausibly alleges that Defendant contributorily  
14 infringed on the Work. For these reasons, the court should not grant the Motion to  
15 Dismiss on this basis.

#### 20 **IV. Direct Infringement**

21 The Motion asserts that Plaintiff has not plausibly set forth facts  
22 demonstrating that Defendant could be held liable for direct infringement. As set  
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1 forth above, Plaintiff does not assert separate claims for direct, vicarious, and/or  
2 contributory infringement, but rather a single claim that is based on any of those  
3 theories of liability. As a result, assuming that Plaintiff has plead a plausible claim  
4 on any *one* of those theories of infringement, dismissal of the claim is improper.  
5 That said, based on the caselaw Defendant has cited in the Motion, it does appear  
6 that a direct infringement theory of liability has not been properly set forth in the  
7 Complaint. Defendant asks that such ‘theory’ be dismissed with prejudice, but  
8 there is no basis for such. See Stross, 2022 U.S. Dist. LEXIS 100750 at \*15 (C.D.  
9 Cal. Feb. 28, 2022) (dismissing claim of direct infringement **without** prejudice and  
10 granting plaintiff leave to amend) (emphasis added). If anything, Plaintiff should  
11 be given the opportunity to seek discovery with respect to her other theories of  
12 liability which very well could reveal additional facts sufficient to support a direct  
13 liability theory. There is simply no basis for dismissing the entirety – or any  
14 portion – of Plaintiff’s claim with prejudice at this stage.

### 19 CONCLUSION

20 For the foregoing reasons, Plaintiff respectfully requests that the Court enter  
21 an Order: (a) denying the Motion; (b) requiring Defendant to file its Answer to the  
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1 Complaint within 14 days of the denial of the Motion; and (c) for such further relief  
2 as the Court deems proper.

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5 Dated: September 20, 2024.

**COPYCAT LEGAL PLLC**

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8 By: /s/ Lauren M. Hausman  
9 Lauren M. Hausman, Esq.  
10 Attorney for Plaintiff  
Elizabeth Waterman

11 **CERTIFICATE OF SERVICE**

12 I hereby certify that on September 20, 2024, I electronically filed the  
13 foregoing document with the Clerk of the Court using CM/ECF, which will  
14 electronically serve all counsel of record.

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17 /s/ Lauren M. Hausman  
18 Lauren M. Hausman, Esq